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Evergreen California Healthcare, L.L.C.*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Phyllis Wehlage, on her behalf and on  
behalf of others similarly situated,

Plaintiff,

vs.

EmpRes Healthcare, Inc.; EHC  
Management LLC; EHC Financial  
Services LLC; Evergreen California  
Healthcare LLC; Evergreen at Arvin  
LLC; Evergreen at Bakersfield LLC;  
Evergreen at Lakeport LLC; Evergreen  
at Heartwood LLC; Evergreen at Springs  
Road LLC; Evergreen at Tracy LLC;  
Evergreen at Oroville LLC; Evergreen at  
Petaluma LLC; Evergreen at Gridley  
(SNF) LLC; and DOES 1 THROUGH  
100,

Defendants.

No. C 10-05839 CW

**DEFENDANTS EMPRES  
HEALTHCARE, INC., EHC  
FINANCIAL SERVICES, L.L.C.  
AND EVERGREEN CALIFORNIA  
HEALTHCARE, L.L.C.'S NOTICE  
OF MOTION AND MOTION TO  
DISMISS PURSUANT TO FED. R.  
CIV. P. 12(b)(2) OR IN THE  
ALTERNATIVE FED. R. CIV. P.  
12(b)(6); MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF;  
DECLARATION OF DALE  
PATTERSON**

Hearing Date: April 7, 2011  
Time: 2 p.m.  
Judge: Hon. Claudia Wilken

1           **TO THE COURT AND TO PLAINTIFF AND HER ATTORNEYS OF**  
 2 **RECORD: PLEASE TAKE NOTICE** that, on April 7, 2011, at 2 p.m., or as soon  
 3 thereafter as the matter may be heard in the Courtroom of the Honorable Claudia  
 4 Wilken, located at 1301 Clay Street, Courtroom 2, Oakland, California 94612,  
 5 defendants EmpRes Healthcare, Inc., EHC Financial Services, L.L.C. and Evergreen  
 6 California Healthcare, L.L.C. (collectively, "Defendants") will and hereby do  
 7 specially appear for the purpose of moving the Court, pursuant to Rule 12(b)(2) of  
 8 the Federal Rules of Civil Procedure, to dismiss the Complaint of plaintiff Phyllis  
 9 Wehlage ("Plaintiff") for lack of *in personam* jurisdiction. Defendants also  
 10 provisionally move the Court, pursuant to Rule 12(b)(6) of the Federal Rules of Civil  
 11 Procedure, to dismiss the Complaint for failure to state a claim by joining two  
 12 motions to dismiss concurrently filed by Evergreen at Lakeport, L.L.C. and EHC  
 13 Management, L.L.C. *et al.*<sup>1</sup>

14           This motion is and will be based on this notice of motion and attached  
 15 memorandum of points and authorities and declaration of Dale Patterson, all  
 16 pleadings and papers on file in this matter, and all other such evidence or argument  
 17 as may be submitted to the Court at or prior to the hearing.

18  
 19 Dated: February 18, 2011

MANATT, PHELPS & PHILLIPS

20  
 21 By: /s/ Barry S. Landsberg  
 22       Barry S. Landsberg  
 23       Attorneys for Specially Appearing  
 24       Defendants EmpRes Healthcare, Inc.; EHC  
       Financial Services, L.L.C. and Evergreen  
       California Healthcare, L.L.C.

25  
 26 <sup>1</sup> Despite the special appearance of these defendants to contest personal jurisdiction,  
 27 it is settled practice for this court to deflect ruling on Rule 12(b)(2) motions  
 28 pending a ruling on a potentially case-dispositive Rule 12(b)(6) motion. *See Kema,*  
*Inc. v Koperwhats*, 2010 WL 3464737, \*12 (N.D.Cal. Sept. 1, 2010) (holding that  
 granting of Rule 12(b)(6) motion mooted consideration of Rule 12(b)(2) motion).

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## MEMORANDUM

### I. INTRODUCTION

Plaintiff Phyllis Wehlage filed this lawsuit against the skilled nursing facility in which she lived, Evergreen Lakeport Healthcare<sup>2</sup> (“Evergreen Lakeport”) in Lakeport, California, as well as against eight other companies that are the licensed operators of different, independently-licensed nursing homes across California in which she never resided. Her putative class action alleges that there was inadequate nurse staffing at all nine facilities during a four-year class period beginning November 15, 2006.

Wehlage also names as defendants four entities that do not even hold licenses to operate skilled nursing facilities (aka nursing homes, or “SNFs.”) These defendants, which are either direct or indirect members of the licensed operating companies, or are companies that provided certain limited direct and indirect management and consulting services, are EmpRes Healthcare, Inc. (“EmpRes”), EHC Management, L.L.C. (“EHC Management”), EHC Financial Services, L.L.C. (“EHC Financial”) and Evergreen California Healthcare, L.L.C. (“Evergreen”). Three of these entities, however, are citizens of the State of Washington, which are not subject to personal jurisdiction in California, and hence should be dismissed for this action.

This Court lacks personal jurisdiction over EmpRes, EHC Financial and Evergreen (collectively, “Defendants”). EmpRes is a Washington corporation with its principal place of business in the State of Washington. Similarly, EHC Financial and Evergreen are two Washington limited liability companies, also with their principal places of business in the State of Washington. None of the Defendants have any relationship with the State of California that would give rise to personal jurisdiction consistent with the established standards. As personal

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<sup>2</sup> Plaintiff sued Evergreen Lakeport as Evergreen at Lakeport, L.L.C., which is the licensee of Evergreen Lakeport.



jurisdiction is lacking in California, the Complaint as against Defendants must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(2).

Movants EmpRes, EHC Financial and Evergreen also join in their co-defendants' concurrently-filed motions to dismiss under Rule 12(b)(6).<sup>3</sup> Despite the special appearance of Defendants to contest personal jurisdiction, it is settled practice for this court to deflect ruling on Rule 12(b)(2) motions pending a ruling on a potentially case-dispositive Rule 12(b)(6) motion. *See Kema, Inc. v Koperwhats*, 2010 WL 3464737, \* 12 (N.D.Cal. Sept. 1, 2010) (holding that granting of Rule 12(b)(6) motion mooted consideration of Rule 12(b)(2) motion).

## II. RELEVANT FACTS

Plaintiff's Complaint asserts, as the sole basis for this Court's jurisdiction, that the collective "defendants" named therein – including EmpRes, EHC Management, EHC Financial, Evergreen, Evergreen at Arvin, L.L.C., Evergreen at Bakersfield, L.L.C., Evergreen Lakeport, Evergreen at Heartwood Avenue, L.L.C.,<sup>4</sup> Evergreen at Springs Road, L.L.C., Evergreen at Tracy, L.L.C., Evergreen at Oroville, L.L.C., Evergreen at Petaluma, L.L.C. and Evergreen at Gridley (SNF), L.L.C. – "have all regularly conducted business throughout the State of California, including, but not limited to, the ownership, licensing, administration, operation, management, and/or supervision of the Facilities."<sup>5</sup>

<sup>3</sup> A motion to dismiss pursuant to Rule 12(b)(6) is being filed concurrently by defendant Evergreen at Lakeport, L.L.C. A second motion pursuant to Rule 12(b)(6) is also being concurrently filed by defendants EmpRes, EHC Management, Evergreen, EHC Financial, Evergreen at Arvin, L.L.C., Evergreen at Bakersfield, L.L.C., Evergreen at Heartwood Avenue, L.L.C., Evergreen at Springs Road, L.L.C., Evergreen at Tracy, L.L.C., Evergreen at Oroville, L.L.C., Evergreen at Petaluma, L.L.C. and Evergreen at Gridley (SNF), L.L.C. Thus, in the alternative, and without waiving any rights or their contention that personal jurisdiction is improper, Defendants hereby move for dismissal of the Complaint pursuant to Rule 12(b)(6).

<sup>4</sup> This entity was incorrectly named in the Complaint as Evergreen at Heartwood, L.L.C.

<sup>5</sup> In the Complaint, the "Facilities" are defined as Evergreen at Arvin, L.L.C., Evergreen at Bakersfield, L.L.C., Evergreen at Lakeport, L.L.C., Evergreen at Heartwood Avenue, L.L.C., Evergreen at Springs Road, L.L.C., Evergreen at Tracy, L.L.C., Evergreen at Oroville, L.L.C., Evergreen at Petaluma, L.L.C. and



(Comp., ¶ 22.) Plaintiff further alleges that defendants EmpRes, EHC Management, EHC Financial and Evergreen “own, license, administer, operate, manage and/or supervise the Facilities.” (Comp., ¶ 11.)

As to the moving Defendants, these allegations are false. The Defendants bringing this Motion, namely EmpRes, EHC Financial and Evergreen, do not license, administer, operate, manage or supervise *any* nursing homes in the State of California. No officers or employees of any of the Defendant entities make decisions regarding staffing at the Facilities. (Declaration of Dale Patterson (“Patterson Decl.”) ¶ 16.) To the contrary, each Facility is an independent Washington limited liability company, individually licensed and regulated by California’s Office of Statewide Health Planning and Development (“OSHPPD”). The limited liability company membership units of the licensed operator of each Facility are owned 100% by Evergreen. (Patterson Decl. ¶ 15.)

#### **Evergreen**

Evergreen, which has never had any employees, is a holding company with no property other than limited liability company membership units in the subsidiary operating companies. (Patterson Decl. ¶ 12.) Evergreen does not transact or participate in business in California. (Patterson Decl. ¶ 17.) Evergreen has never maintained an office in California, does not own or possess any real or personal property and has never held any mortgages or liens in California, has never maintained a California account at any bank or depository institution, has never had a telephone listing in California, has never had officers in California, and has never incurred or paid income or property taxes in California. (Patterson Decl. ¶ 13.) 100% of the limited liability company membership units of Evergreen are owned by EmpRes. (Patterson Decl., ¶ 5.)

#### **EHC Financial**

Evergreen at Gridley (SNF), L.L.C. (Comp., ¶ 21.)

1 EHC Financial is a management and consulting company. It's  
 2 business is to provide certain limited accounting, information technology services  
 3 and other specified services to EHC Management. (Decl., ¶ 6.) EHC Financial  
 4 does not makes sales in California, does not hold any California business licenses  
 5 and does not solicit or engage in business in California. EHC Financial does not  
 6 purposefully direct its business activities toward California residents nor does it  
 7 specifically seek out California residents for its business. (Patterson Decl. ¶ 7.)  
 8 EHC Financial maintains the EHC Management website, which provides certain  
 9 information on EHC Management and the individual SNFs. (Patterson Decl. ¶ 10.)  
 10 EHC Financial has never maintained an office in California, does not own or  
 11 possess any real or personal property and has never held any mortgages or liens in  
 12 California, has not maintained a California account at any bank or depository  
 13 institution since 2002, has never had a telephone listing in California, has not had  
 14 officers or employees who resided or were based in California since 2001, and has  
 15 never incurred or paid income or property taxes in California. (Patterson Decl. ¶ 8.)  
 16 The limited liability company membership units of EHC Financial are owned 100%  
 17 by EmpRes. (Patterson Decl. ¶ 5.)

### 18 EmpRes

19 EmpRes is a holding company. It provides no services and has no  
 20 employees. (Patterson Decl., ¶¶ 2, 3.) EmpRes has never maintained an office in  
 21 California, does not own or possess any real or personal property and has never  
 22 held any mortgages or liens in California, has never maintained a California  
 23 account at any bank or depository institution and has never had a telephone listing  
 24 in California, has never had officers in California. (Patterson Decl. ¶ 3.) The stock  
 25 of EmpRes is owned 100% by the EmpRes Healthcare, Inc. Employee Stock  
 26 Ownership Trust, a Washington trust. (Patterson Decl. ¶ 4.)

27 Finally, Defendants neither have consented to jurisdiction nor have  
 28 they appeared in this matter, other than for the sole limited purpose of joining in the

1 removal of the action to federal court. (Patterson Decl. ¶ 21.)

### 2 **III. ARGUMENT**

3 Traditionally, a California district court may exercise jurisdiction over  
 4 a defendant if the defendant: (a) is personally served while physically present in  
 5 California, (b) is domiciled within the State, or (c) consents to or appears in the  
 6 action. *See Burnham v. Superior Court*, 495 U.S. 604, 609 (1990); *see also Metro-*  
 7 *Goldwyn-Mayer Inc. v. Grokster, Ltd.*, 243 F.Supp.2d 1073, 1082 (C.D. Cal. 2003).  
 8 Based on California's long-arm statute, a district court also may exercise  
 9 jurisdiction over a defendant that has sufficient minimum contacts with California.  
 10 *See Fed. R. Civ. P. 4(k)(1)(A); Cal. Code Civ. Proc. § 410.10; International Shoe*  
 11 *Co. v. Washington*, 326 U.S. 310, 316 (1945). None of these bases for personal  
 12 jurisdiction exist with respect to Defendants. Accordingly, this Court should grant  
 13 the instant motion and dismiss the Complaint against Defendants.

#### 14 **A. Plaintiff Bears the Burden to Prove Facts Establishing Jurisdiction** 15 **Over Defendants.**

16 The plaintiff has the burden of establishing the court's personal  
 17 jurisdiction over a defendant. *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir.  
 18 2001). In response to a challenge to the existence of personal jurisdiction, the  
 19 plaintiff must make a *prima facie* showing of jurisdiction based upon admissible  
 20 evidence in the form of declarations and authenticated documentary evidence. *See*  
 21 *Data Disc, Inc. v. Systems Technology Assoc., Inc.*, 557 F.2d 1280, 1285 (9th Cir.  
 22 1977). Plaintiff's Complaint does not set forth any specific contacts that EmpRes,  
 23 EHC Financial or Evergreen have in California, nor could it do so.

#### 24 **B. The Three Traditional Bases for Jurisdiction Are Not Present** 25 **Here.**

26 Defendants are not subject to personal jurisdiction under any of the  
 27 three traditional bases for jurisdiction: (a) personal service on persons physically  
 28 present in California, (b) domicile within the State, or (c) consent to or appearance

1 in the action. *See Burnham, supra*, 495 U.S. at 609.

2 *First*, Defendants were not personally served with the summons in  
3 California in a way that conferred jurisdiction over them. As a courtesy to  
4 Plaintiff's counsel, Defendants' then counsel, Kathleen Walker, agreed to accept  
5 service on behalf of all parties named in the Complaint, including Defendants.  
6 However, Ms. Walker sent Plaintiff's counsel a letter with the Acknowledgements  
7 of Receipt wherein she confirmed the need for Defendants to preserve any and all  
8 jurisdictional challenges, and hence Ms. Walker's acceptance of service did not  
9 waive Defendants' rights to later assert a lack of personal jurisdiction.<sup>6</sup> (Patterson  
10 Decl. ¶ 20.)

11 *Second*, Defendants are not domiciled within California. A  
12 corporation is deemed a citizen of both the state in which it was incorporated and of  
13 the state in which it has its principal place of business. 28 USC § 1332(c)(1). Here,  
14 Defendants are a Washington corporation and two Washington limited liability  
15 companies, all with principal places of business in the State of Washington.  
16 (Patterson Decl. ¶¶ 2, 6, 11). Thus, Defendants are not domiciled in the State of  
17 California.

18 *Third*, Defendants have not consented to jurisdiction nor have they  
19 appeared in this action, other than for the limited purpose of removing the action to  
20 federal court (Patterson Decl. ¶ 21), which does not waive the defense of personal  
21 jurisdiction. *See Dielsi v. Falk*, 916 F. Supp. 985, 994 (C.D. Cal. 1996).

22  
23 <sup>6</sup> To that end, Ms. Walker added the following language to the Acknowledgement  
24 of Receipt for Defendants: "The parties signing below do not consent to personal  
25 jurisdiction and reserve the right to contest personal jurisdiction. The parties  
26 signing below have signed the Acknowledgment of Receipt in reliance on  
27 Plaintiff's agreement that plaintiffs will not use such signing as a basis to assert  
28 personal jurisdiction over the parties." Even without Defendants' specific  
reservation of rights, such service would not confer personal jurisdiction on  
Defendants. *See Marriage of Meredith*, 129 Cal. App. 3d 356, 362 (1982) (a non-  
resident's signing of an acknowledgement of service does not confer personal  
jurisdiction, absent a statement on the form that, by signing the document, the  
defendant is submitting to the jurisdiction of California courts).

Thus, under the common law, no basis for jurisdiction exists over Defendants.

**C. Defendants Do Not Have Sufficient Contacts With California to Confer Either General or Specific Personal Jurisdiction.**

Since personal jurisdiction over Defendants, which are non-resident entities, does not otherwise exist, Plaintiff must show that Defendants had at least “minimum contacts” with California, such that the exercise of jurisdiction “does not offend traditional notions of fair play and substantial justice.” *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1110-11 (9th Cir. 2002) (quoting *International Shoe*, 326 U.S. at 316). Under the minimum contacts test, an essential criterion is whether the “quality and nature” of the defendant’s activity is such that it is reasonable and fair to require the defendant to conduct his defense in that state. *West Corp. v. Superior Court (Sanford)*, 116 Cal. App. 4th 1167, 1172 (2004) (citations omitted).<sup>7</sup>

Applying the minimum contacts analysis, a court may obtain either general or specific jurisdiction over a defendant. *Doe v. Unocal, supra*, 248 F.3d at 923. As set forth below, Plaintiff cannot establish either.

**1. The Court’s Jurisdiction Over Parent or Subsidiary Companies Alone is Insufficient to Confer Jurisdiction Over Defendants.**

The fact that Defendants are alleged in the Complaint to be affiliated in some manner with other defendants which are subject to this Court’s jurisdiction is irrelevant to the analysis. The mere existence of a relationship between a parent company and its subsidiaries is *not* sufficient to establish personal jurisdiction over the parent on the basis of the subsidiaries’ minimum contacts with the forum. *See Doe v. Unocal, supra*, 248 F.3d at 925 (citing *Transure, Inc. v. Marsh and McLennan, Inc.*, 766 F.2d 1297, 1299 (9th Cir. 1985)); *see also Keeton v. Hustler*

<sup>7</sup> Where there is no applicable federal statute governing personal jurisdiction, the district court applies the law of the state in which the district court sits. *See Panavision Int’l, L.P. v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998).

1 *Magazine, Inc.*, 465 U.S. 770, 781 n. 13 (1984) (“jurisdiction over a parent  
 2 corporation [does not] automatically establish jurisdiction over a wholly owned  
 3 subsidiary”). Furthermore, Plaintiff fails to allege facts sufficient to establish, if  
 4 proven, that Defendants are alter egos of the Facilities such that the acts of the  
 5 Facilities in California could confer jurisdiction on Defendants. *See Unocal*, 248  
 6 F.3d at 927.

7 Thus, the Court may only consider Defendants’ own minimum  
 8 contacts, and not those of any subsidiary or affiliate, as a basis for exercising  
 9 jurisdiction over Defendants.

10 2. The Court Lacks General Jurisdiction Over Defendants Because  
 11 They do Not Have Substantial, Continuous and Systematic  
 12 Contacts With California and Because Jurisdiction Is Not  
 13 Reasonable.

14 None of the moving Defendants are subject to general jurisdiction in  
 15 California. General jurisdiction exists only when a defendant’s activities in the  
 16 state are “extensive or wide-ranging” or “substantial . . . continuous and  
 17 systematic.” *Bancroft & Masters, Inc. v. Augusta National Inc.*, 223 F.3d 1082,  
 18 1086 (9th Cir. 2000) (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*,  
 19 466 U.S. 408, 415 (1984)); *see also Hammond v. Monarch Investors*, 2010 U.S.  
 20 Dist. LEXIS 66595, at \* 5 (S.D. Cal. Jul. 2, 2010) (“Unless a defendant’s contacts  
 21 with a forum are so substantial, continuous, and systematic that the defendant can  
 22 be deemed to be ‘present’ in that forum for all purposes, a forum may exercise only  
 23 ‘specific’ jurisdiction – that is, jurisdiction based on the relationship between the  
 24 defendant’s forum contacts and the plaintiff’s claim”). In such a situation, there is a  
 25 constitutionally sufficient relationship to warrant jurisdiction for all causes of action  
 26 against the defendant, regardless of whether the specific cause of action is  
 27 connected to the defendant’s business activities in the forum. *Bancroft*, 223 F.3d at  
 28 1086.



General jurisdiction exists where the defendant's contacts with the forum are akin to physical presence, such as when a company operates most of its administrative functions, employs most of its staff, and makes substantial purchases in the forum. *See Stone v. Advance Am. Cash Advance Centers, Inc.*, 2009 U.S. Dist. LEXIS 24762, at \* 11 (S.D.Cal. Mar. 20, 2009). The standard for establishing general jurisdiction is "fairly high" and requires that the defendant's contacts be of the sort that approximate physical presence. *Bancroft*, 223 F.3d at 1086.

The exercise of jurisdiction must also be reasonable. *Doe v. Unocal*, *supra*, 248 F.3d at 925. "A determination of the reasonableness of the exercise of jurisdiction in a given case involves the evaluation of several factors: the burden on the defendant, the interests of the forum state, and the plaintiff's interest in obtaining relief." *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113 (1987).

Defendants plainly are not subject to general jurisdiction in California. A defendant subject to general jurisdiction in the State of California is one whose contacts with the forum are so substantial that they "approximate physical presence." *Bancroft*, 223 F.3d at 1086. Defendants do not even remotely maintain or approximate physical presence in California in the manner contemplated. To subject Defendants to the general jurisdiction of this Court, Plaintiff must therefore establish that Defendants personally engaged in "substantial . . . continuous and systematic" activities *within* the State of California. *Id.* She cannot do this.

Defendants' non-existent California "contacts" could not be classified as "substantial . . . , continuous and systematic." Defendants have not (1) maintained an office in California, (2) owned or possessed any real or personal property or held any mortgages or liens in California, (3) had California accounts at any bank or depository institution since 2002<sup>8</sup>, (4) had telephone listings in

<sup>8</sup> EHC Financial has not maintained a California account in any bank or depository institution since 2002. EmpRes and Evergreen have never maintained any California accounts.



1 California or (5) had officers or employees in California since 2001<sup>9</sup>. (Patterson  
2 Decl. ¶¶ 3, 8, 13.)

3 In fact, Plaintiff's only basis for asserting jurisdiction over Defendants  
4 is that the collective body of various defendant entities, and certain of their  
5 subsidiaries own, license, administer, operate, manage or supervise SNFs in the  
6 State of California. (Comp., ¶ 22.) But Defendants do not license, administer,  
7 operate, manage or supervise nursing homes in the State of California. (Patterson  
8 Decl. ¶ 18.) And Evergreen's ownership of the membership units of the limited  
9 liability companies that are the licensed operators of the SNFs is not sufficient.<sup>10</sup>

10 The present uncontroverted facts, established in Mr. Patterson's  
11 accompanying declaration, make it clear that Defendants' contacts do not come  
12 close to the minimum quantum needed for general jurisdiction under controlling  
13 case law. For example, in *Bancroft*, the Ninth Circuit agreed with the district court  
14 that the defendant's contacts were insufficient to confer general jurisdiction over  
15 the defendant. *Bancroft*, 223 F.3d at 1086. The Ninth Circuit noted that the  
16 defendant was not registered or licensed to do business in California, paid no taxes  
17 in California, maintained no bank accounts in California, had no advertising  
18 targeted towards California, and maintained only a passive website (meaning  
19 consumers could not use it to make purchases). *Id.* Though the defendant  
20 occasionally sold merchandise to California residents and had license agreements  
21 with two television networks and a handful of California vendors, the Ninth Circuit  
22 concluded that such limited contacts with California were insufficient to establish  
23 general jurisdiction. *Id.*

24  
25 <sup>9</sup> EHC Financial has not had employees in California since 2001. EmpRes and  
Evergreen have never had officers or employees in California.

26 <sup>10</sup> As noted, the existence of a relationship between a parent company and its  
27 subsidiaries is not sufficient to establish personal jurisdiction over the parent on the  
28 basis of the subsidiaries' minimum contacts with the forum. *Doe v. Unocal*, 248  
F.3d at 925. Thus, the Court may only consider Defendants' minimum contacts as  
a basis for jurisdiction over Defendants.

Here, like the defendant in *Bancroft*, Defendants are not registered to do business in California<sup>11</sup> and maintained no accounts here since 2002.<sup>12</sup> (Patterson Decl. ¶¶ 3, 8, 13.) EHC Financial uses employees in Washington to maintain a passive website for EHC Management, which does not offer to sell anything online or allow California residents to register to live at any of the Facilities. The website offers general information about the Facilities, but if potential residents or family members want to ask specific questions about the Facilities or schedule a tour, they are put in contact with the specific facility itself, or perhaps with EHC Management. (Patterson Decl. ¶ 10.) Under *Bancroft*, this is not sufficient to establish general jurisdiction.

Likewise, in *Unocal*, the Ninth Circuit granted a defendant's motion to dismiss after determining that the defendant, Total, S.A., did not have sufficient contacts with California. Total's only alleged contacts with California were through its subsidiary holding companies. *Doe v. Unocal, supra*, 248 F.3d at 930-31. Defendants, too, have no direct contact with the State of California. (Patterson Decl. ¶¶ 18, 19.) Their only connection with California is through the Facilities located there.

Therefore, Defendants lack the contacts in California required to

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<sup>11</sup> Qualification to do business in California does not operate to confer jurisdiction. An out-of-state corporation can "qualify" to do business in California by filing a prescribed form with the Secretary of State and paying statutory fees. *See* Corp. Code § 2105. As part of the "qualification" process, a foreign corporation must appoint a local agent for service of process (or consent to service on the Secretary of State, or, under the Franchise Investment Law, the Commissioner of Corporations). *See* Corp. Code §§ 2105(a)(4), (5) & 31420; Ins. Code §§ 1610-1611. This is not a consent to jurisdiction: A foreign corporation's designation of an agent for service of process in California is not a submission to personal jurisdiction here – *i.e.*, although service of summons may be made on the designated agent, the action cannot be maintained against a foreign corporation absent minimum contacts with California. *See Gray Line Tours of Southern Nevada v. Reynolds Electrical & Engineering Co., Inc.*, 193 Cal.App.3d 190, 193-194 (1987) (no personal jurisdiction found because defendant did not have sufficient contacts with the State of California); *Thomson v. Anderson*, 113 Cal.App.4th 258, 270 (2003).

<sup>12</sup> See footnote 8.

1 establish general jurisdiction and jurisdiction is not reasonable.

2 3. The Court Lacks Specific Jurisdiction Over Defendants Because  
 3 They Have Not Purposefully Availed Themselves of the  
 4 Privileges of Conducting Activities in California, Plaintiff's  
 5 Claims Do Not Arise Out of Defendants' Contacts With  
 6 California, and the Exercise of Jurisdiction Is Not Reasonable.

7 Defendants also lack the contacts in California required to establish  
 8 specific jurisdiction. In contrast to general jurisdiction, a court may exercise  
 9 specific jurisdiction over a defendant if the cause of action itself arises out of or has  
 10 a substantial connection to the defendant's contacts with California. The Ninth  
 11 Circuit has applied a three-part test – and the plaintiff must demonstrate that the  
 12 defendant meets each prong – to determine whether the assertion of specific  
 13 jurisdiction comports with due process. *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th  
 14 Cir. 1995). Here, none of the three conjunctive prongs is satisfied.

15 *First*, to be subject to specific jurisdiction, the defendant must have  
 16 taken steps to “purposefully avail” itself of the privileges of conducting activities in  
 17 the forum state, thereby invoking the benefits and protections of the forum and  
 18 having “fair warning” that a particular activity may subject it to jurisdiction.  
 19 *Corporate Inv. Business Brokers v. Melcher*, 824 F.2d 786, 788 (9th Cir. 1987).  
 20 Purposeful availment is demonstrated when the defendant has taken deliberate  
 21 action within the forum state or created continuing obligations to residents of the  
 22 forum state. *Burger King v. Rudzewicz*, 471 U.S. 462, 475-76 (1985). A defendant  
 23 need not be physically present within the forum state, provided its efforts are  
 24 purposefully directed towards forum residents. *Ballard*, 65 F.3d at 1498.

25 *Second*, the claim must arise out of or result from the defendant's  
 26 forum-related activities. *Id.* A claim “arises out of” the defendant's forum-related  
 27 activities if the injury to the plaintiff would not have occurred “but for” the  
 28 defendant's activities. *Id.*

*Third*, the assertion of jurisdiction must be reasonable. *Id.* In

1 considering reasonableness, courts balance several factors to determine whether the  
2 asserted jurisdiction comports with “fair play and substantial justice.” *Id.*

3 Plaintiff has the burden of establishing the first two elements. *See SDS*  
4 *Korea Co. v. SDS USA, Inc.*, 2010 U.S. Dist. LEXIS 80223, at \* 33 (S.D. Cal. Aug.  
5 4, 2010).

6 a. Purposeful Availment

7 Plaintiff must satisfy the first prong by demonstrating that the  
8 defendant “purposefully directed” its conduct toward the forum state, or  
9 “purposefully availed” itself of the privilege of doing business in that state. *SDS*  
10 *Korea Co.*, 2010 U.S. Dist. LEXIS 80223, at \* 32. The defendant’s intent must be  
11 “to perform an actual, physical act in the real world, rather than an intent to  
12 accomplish a result or consequence of that act.” *Schwarzenegger v. Fred Martin*  
13 *Motor Co.*, 374 F.3d 797, 806 (9th Cir. 2004).

14 In *Burger King*, the United States Supreme Court extensively  
15 discussed the level of “purposeful availment” that must be demonstrated before a  
16 court may constitutionally exercise personal jurisdiction over a nonresident  
17 defendant:

18 The unilateral activity of those who claim some  
19 relationship with a nonresident defendant cannot satisfy  
20 the requirement of contact with a forum State. The  
21 application of that rule will vary with the quality and  
22 nature of the defendant’s activity, *but it is essential in*  
*each case that there be some act by which the defendant*  
*purposefully avails itself of the privilege of conducting*  
*activities within the forum State, thus invoking its benefits*  
*and protections of its laws.*

23 *Burger King*, 471 U.S. at 474-75 (citing *Hanson v. Denckla*, 357 U.S. 235, 253  
24 (1958) (emphasis added)). The Supreme Court pointed out that the “purposeful  
25 availment” requirement ensures that a defendant will not be haled into a jurisdiction  
26 solely as a result of “fortuitous” or “attenuated” contacts. *Id.* at 475.

27 “[A]bsent some form of ‘purposeful availment,’ the fact a defendant’s  
28

1 conduct in the forum state has some relationship to the causes of action asserted in  
 2 the lawsuit, cannot, in and of itself, render jurisdiction reasonable.” *Edmunds v.*  
 3 *Superior Court (Ronson)*, 24 Cal.App.4th 221, 231 (1994) (citation omitted).  
 4 Specific jurisdiction over a nonresident defendant requires a substantial nexus  
 5 between the plaintiff’s alleged claim and the defendant’s activities *within* the state:

6 [T]he cause of action must arise out of an act done or  
 7 transaction consummated in the forum, or defendant must  
 8 perform some other act by which he purposefully avails  
 9 himself of the privilege of conducting activities in the  
 10 forum, thereby invoking the benefits and protections of its  
 11 laws.

12 *Vons Cos., Inc. v. Seabest Foods, Inc.*, 14 Cal.4th 434, 448 (1996), *cert. denied sub*  
 13 *nom. Washington Restaurant Mgm’t v. Vons Cos., Inc.*, 522 U.S. 808 (1997).

14 Defendants conduct does not remotely rise to the requisite standard.  
 15 Defendants have not purposefully availed themselves of any benefit of the laws of  
 16 the State of California such that they would reasonably expect to be haled into court  
 17 here. Again, Defendants have not (1) maintained an office in California, (2) owned  
 18 or possessed any real or personal property or held any mortgages or liens in  
 19 California, (3) had California accounts at any bank or depository institution since  
 20 2002<sup>13</sup>, (4) had telephone listings in California, or (5) had officers or employees in  
 21 California since 2001<sup>14</sup>. (Patterson Decl. ¶¶ 3, 8, 13.) Defendants conduct no  
 22 activity in California and they certainly have done nothing to *purposefully* avail  
 23 themselves of California privileges by invoking this state’s benefits and protections.

#### 24 b. Forum-Related Activities

25 Plaintiff also cannot establish that her claims arise out of or result from  
 26 Defendants’ forum-related activities. A claim “arises out of” the defendant’s  
 27 forum-related activities if the injury to the plaintiff would not have occurred “but  
 28 for” the defendant’s activities. *Ballard, supra*, 65 F.3d at 1500. In this case, as set

<sup>13</sup> See footnote 8.

<sup>14</sup> See footnote 9.

1 forth in EHC Management, *et al*'s motions to dismiss, filed concurrently herewith,  
 2 Plaintiff did not suffer any injury cognizable under Health & Safety Code Section  
 3 1430(b), the UCL or the CLRA at the hands of Defendants, and therefore the  
 4 second prong for specific jurisdiction cannot be satisfied on this ground alone.  
 5 However, even if Plaintiff had suffered an injury, the claims alleged in the  
 6 Complaint could not have occurred "but for" Defendants' activities in California  
 7 because Defendants conduct no activity in California. In addition, because  
 8 Defendants do not license, administer, operate, manage or supervise any SNF in  
 9 California (Patterson Decl. ¶¶ 18, 19), they could not be the cause of any injuries  
 10 alleged in the Complaint.

11 c. Reasonableness

12 Finally, though the Court need not reach the third prong of the specific  
 13 jurisdiction test because Plaintiff cannot establish either of the first two prongs  
 14 against Defendants, specific jurisdiction over Defendants also fails under the third  
 15 prong of the test because the assertion of jurisdiction over Defendants in California  
 16 is not reasonable. In analyzing reasonableness, the Ninth Circuit considers seven  
 17 factors:

- 18 (1) the extent of the defendant's purposeful interjection;
- 19 (2) the burden on the defendant of defending in the forum;
- 20 (3) the extent of conflict with the sovereignty of the defendant's state;
- 21 (4) the forum state's interest in adjudicating the dispute;
- 22 (5) the most efficient judicial resolution of the controversy;
- 23 (6) the importance of the forum to the plaintiff's interest in convenient  
 24 and effective relief; and
- 25 (7) the existence of an alternate forum.

26 *Watts, supra*, 303 F.3d at 1114.

27 A balancing of the factors shows that it is not reasonable to exercise  
 28 jurisdiction over Defendants, because Defendants have no presence in California.



1 They do not do business in California and do not have any offices or staff in  
 2 California. It would be a burden for Defendants to defend a lawsuit in California,  
 3 and there exist alternate forums where Defendants are subject to jurisdiction (for  
 4 example, the State of Washington, where each have their principal place of  
 5 business). Therefore, Plaintiff also fails to satisfy the final prong of the specific  
 6 jurisdiction test because jurisdiction over Defendants in California is unreasonable.

7 **IV. CONCLUSION**

8 For all of the foregoing reasons, Defendants respectfully requests that  
 9 the Court grant their Motion to Dismiss.

10  
 11 Dated: February 18, 2011

Respectfully submitted,

12 MANATT, PHELPS & PHILLIPS

13  
 14 By: /s/ Barry S. Landsberg

15 Barry S. Landsberg  
 16 *Attorneys for Specially Appearing*  
 17 *Defendants EmpRes Healthcare, Inc.; EHC*  
 18 *Financial Services, L.L.C. and Evergreen*  
 19 *California Healthcare, L.L.C.*

20  
 21 300214057.3



**DECLARATION**

1                                   **DECLARATION OF DALE PATTERSON**

2                   I, Dale Patterson, hereby declare as follows:

3           1.     I am Chief Executive Officer of EHC Financial Services, L.L.C. I  
4     submit this Declaration in support of defendants EmpRes Healthcare, Inc., EHC  
5     Financial Services, L.L.C. and Evergreen California Healthcare, L.L.C.'s Motion to  
6     Dismiss pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure. I have  
7     personal knowledge of the facts stated herein, and, if called as a witness to testify, I  
8     could and would do so competently.

9                                   **EmpRes**

10          2.     EmpRes Healthcare, Inc. ("EmpRes") is a holding company,  
11     incorporated in the State of Washington, with its principal place of business in the  
12     State of Washington.

13          3.     EmpRes provides no services and has no employees. EmpRes has  
14     never maintained an office in California, does not own or possess any real or  
15     personal property and has never held any mortgages or liens in California, has  
16     never maintained a California account at any bank or depository institution, has  
17     never had a telephone listing in California, has never had officers who have worked  
18     of resided in California.

19          4.     The stock of EmpRes is owned 100% by the EmpRes Healthcare, Inc.  
20     Employee Stock Ownership Trust, a Washington trust. Andrew V. Martini, a  
21     Washington resident, is the trustee of the EmpRes Healthcare, Inc. Employee Stock  
22     Ownership Trust. Beneficial owners of the trust reside in many states including  
23     California.

24          5.     EmpRes owns 100% of the limited liability company membership  
25     units of EHC Management, L.L.C. ("EHC Management<sup>1</sup>"), EHC Financial  
26     Services, L.L.C. ("EHC Financial") and Evergreen California Healthcare, L.L.C.  
27     ("Evergreen").

28     <sup>1</sup> EHC Management is not a party to this Motion.

**EHC Financial**

6. EHC Financial is a Washington limited liability company, with its principal place of business in the State of Washington. EHC Financial is a management and consulting company. Its business is to provide certain limited accounting, information technology services and other services to EHC Management.

7. EHC Financial does not makes sales in California, does not hold any California business licenses, and does not solicit or engage in business in California. EHC Financial does not purposefully direct its business activities toward California residents nor does it specifically seek out California residents for its business.

8. EHC Financial has never maintained an office in California, does not own or possess any real or personal property and has never held any mortgages or liens in California, has not maintained a California account at any bank or depository institution since 2002, has never had a telephone listing in California, has not had officers or employees who resided or were based in California since 2001, and has never incurred or paid income or property taxes in California.

9. EHC Financial was previously called Evergreen Healthcare Management, L.L.C. The name change took place approximately January 1, 2007.

10. EHC Financial maintains the website for EHC Management, L.L.C. located at [www.evergreenhealthcare.com](http://www.evergreenhealthcare.com). The website does not offer to sell anything online or allow California residents to register at any of the California skilled nursing facilities listed in the Complaint ("SNFs"). The website offers general information about EHC Management, L.L.C. and various SNFs, but if potential residents or family members want to ask specific questions about SNFs or schedule a tour, they are put in contact with either the specific SNF, or with EHC Management, L.L.C.

1                   **Evergreen**

2           11. Evergreen is a Washington limited liability company, with its principal  
3 place of business in the State of Washington.

4           12. Evergreen has never had any employees. It is a holding company with  
5 no property other than limited liability company membership units in the subsidiary  
6 operating companies.

7           13. Evergreen has never maintained an office in California, does not own  
8 or possess any real or personal property in California, has never held any mortgages  
9 or liens in California, has never maintained a California account at any bank or  
10 depository institution, has never had a telephone listing in California, has never had  
11 officers or employees in California, and has never incurred or paid income or  
12 property taxes in California.

13                   **The SNFs**

14           14. Each SNF is an independent Washington limited liability company,  
15 individually licensed and regulated by the California Office of Statewide Health  
16 Planning and Development ("OSHPD"). A true and correct link to the OSHPD  
17 self-authenticating website, where license information regarding every entity named  
18 in the Complaint, is as follows: <https://www.alirts.oshpd.ca.gov/default.aspx>.

19           15. The limited liability company membership units of each of the  
20 licensed operators of the SNFs are owned 100% by Evergreen.

21                   **Defendants**

22           16. No officers or employees of any of the Defendant entities make  
23 decisions regarding staffing at the SNFs.

24           17. Defendants do not transact or participate in business in California.

25           18. Defendants do not license, administer, operate, manage or supervise  
26 SNFs in the State of California, as alleged in the Complaint. Neither Evergreen,  
27 EmpRes or EHC Financial owns the SNFs in the State of California, although  
28

1 Evergreen owns 100% of the membership units of the limited liability companies  
2 that are the licensed operators of the SNFs.

3 19. Defendants are not registered to do business in the State of California.  
4 Defendants have no appointed registered agent for service of process in the State of  
5 California.

6 20. As a courtesy to Plaintiff's counsel, Defendants' then counsel,  
7 Kathleen Walker of Lewis Brisbois Bisgaard & Smith LLP in Los Angeles, agreed  
8 to accept service on behalf of all parties named in the Complaint, including  
9 Defendants. Ms. Walker sent Plaintiff's counsel a letter dated November 24, 2010  
10 enclosing the Acknowledgements of Receipt. Therein, she confirmed that given the  
11 need for Defendants to preserve any and all jurisdictional challenges, Plaintiff  
12 agreed that Ms. Walker's acceptance of service did not waive Defendants' rights to  
13 later assert a lack of personal jurisdiction. Ms. Walker added the following  
14 language to the Acknowledgement of Receipt: "The parties signing below do not  
15 consent to personal jurisdiction and reserve the right to contest personal  
16 jurisdiction. The parties signing below have signed the Acknowledgment of  
17 Receipt in reliance on Plaintiff's agreement that plaintiffs will not use such signing  
18 as a basis to assert personal jurisdiction over the parties." True and correct copies  
19 of Ms. Walker's November 24, 2010 letter and the Acknowledgements of Receipt  
20 are attached collectively hereto as **Exhibit 1**.

21 21. Defendants have not consented to jurisdiction in California nor have  
22 they appeared in this matter other than for the sole purpose of removing the  
23 Complaint to federal court.

1 I declare under penalty of perjury under the laws of the United States  
2 of America that the foregoing is true and correct. Executed this 18<sup>th</sup> day of February,  
3 2011 at Vancouver, Washington.

4 

5 Dale Patterson  
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POS-015

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): <b>Kathryn A. Stebner (Bar # 121088)</b> <b>Stebner and Associates</b> <b>870 Market Street</b> <b>San Francisco, CA 94102</b> TELEPHONE NO.: (415) 362-9800 FAX NO. (Optional): (415) 362-9801 E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): <b>Phyllis Wehlage, Plaintiff</b>		FOR COURT USE ONLY          
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SONOMA STREET ADDRESS: <b>600 Administration Drive</b> MAILING ADDRESS: CITY AND ZIP CODE: <b>Santa Rosa 95403</b> BRANCH NAME:		
PLAINTIFF/PETITIONER: <b>Phyllis Wehlage, on her behalf and on behalf of others similarly situated, et al.</b> DEFENDANT/RESPONDENT: <b>EmpRes Healthcare, Inc., et al.</b>		
NOTICE AND ACKNOWLEDGMENT OF RECEIPT—CIVIL		CASE NUMBER: <b>SCV 248613</b>

TO (insert name of party being served): Please see attached.

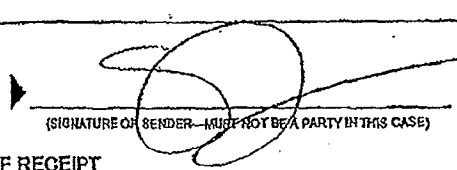
## NOTICE

The summons and other documents identified below are being served pursuant to section 415.30 of the California Code of Civil Procedure. Your failure to complete this form and return it within 20 days from the date of mailing shown below may subject you (or the party on whose behalf you are being served) to liability for the payment of any expenses incurred in serving a summons on you in any other manner permitted by law.

If you are being served on behalf of a corporation, an unincorporated association (including a partnership), or other entity, this form must be signed by you in the name of such entity or by a person authorized to receive service of process on behalf of such entity. In all other cases, this form must be signed by you personally or by a person authorized by you to acknowledge receipt of summons. If you return this form to the sender, service of a summons is deemed complete on the day you sign the acknowledgment of receipt below.

Date of mailing: 11/22/10

Kathryn R. Stebner  
 (TYPE OR PRINT NAME)

  
 (SIGNATURE OF SENDER—MUST NOT BE A PARTY IN THIS CASE)

## ACKNOWLEDGMENT OF RECEIPT

This acknowledges receipt of (to be completed by sender before mailing):

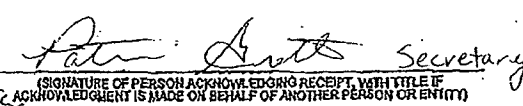
1. ☒ A copy of the summons and of the complaint.  
 2. ☒ Other (specify):

Civil Case Cover Sheet, Notice of Assignment to Judge and Notice of Case Management  
 Conference with ADR Packet and Declaration of Phyllis Wehlage.

The parties signing below do not consent to personal jurisdiction and reserve the right to contest personal jurisdiction. The parties signing below have signed the Acknowledgment of Receipt in reliance on Plaintiff's agreement that plaintiffs will not use such signing as a basis to assert personal jurisdiction over the parties.

Date this form is signed: 11/24/10

Patricia Groth EHC Financial Services  
 (TYPE OR PRINT YOUR NAME AND NAME OF ENTITY, IF ANY,  
 ON WHOSE BEHALF THIS FORM IS SIGNED)  
Evergreen California Healthcare, L.L.C.  
EmpRes Healthcare, Inc.

  
 (SIGNATURE OF PERSON ACKNOWLEDGING RECEIPT, WITH TITLE IF  
 ACKNOWLEDGMENT IS MADE ON BEHALF OF ANOTHER PERSON OR ENTITY)

**ATTACHMENT TO NOTICE AND ACKNOWLEDGMENT OF RECEIPT**

To: BmpRes Healthcare, Inc.; [REDACTED] EHC Financial Services LLC;  
Evergreen California Healthcare LLC; [REDACTED]  
[REDACTED]  
[REDACTED]

**LEWIS  
BRISBOIS  
BISGAARD  
& SMITH LLP** 221 North Figueroa Street, Suite 1200  
Los Angeles, CA 90012  
Telephone: 213.250.1800  
Fax: 213.250.7900  
ATTORNEYS AT LAW www.lbbbslaw.com

KATHLEEN M. WALKER  
DIRECT DIAL: 213.680.5199  
E-MAIL: kwalker@lbbbslaw.com

November 24, 2010

File No.  
Pending

***VIA E-MAIL AND U.S. MAIL***

Kathryn A. Stebner  
Stebner and Associates  
870 Market Street  
San Francisco, CA 94102

Re: Phyllis Wehlage, et al. v. Evergreen

Dear Ms. Stebner:

This will confirm the agreement reached between our respective offices that in exchange for my client agreeing to accept personal service of the complaint in the aforementioned matter you have provided the defendants with a sixty day extension in which to respond to the complaint. Those notices of acknowledgments are enclosed for your review.

As discussed today, several of the entities named are Washington based and not authorized to do business in California. Given your need for service to be accomplished as soon as possible and my clients' need to preserve any and all jurisdictional challenges that may exist for them, you have specifically agreed that acceptance of service will not and does not waive my clients' rights to later assert these issues. To that end, I have added to the following language to the Notice of Acknowledgement as to the Washington entities as follows: "The parties signing below do not consent to personal jurisdiction and reserve the right to contest personal jurisdiction. The parties signing below have signed this Acknowledgment of Receipt in reliance on Plaintiff's agreement that plaintiffs will not use such signing as a basis to assert personal jurisdiction over the parties." I trust this meets with your approval.

Kathryn Stebner  
November 24, 2010  
Page 2

Thank you for your patience and have a wonderful Thanksgiving holiday.

Very truly yours,

*Dictated but not read*

Kathleen M. Walker of  
LEWIS BRISBOIS BISGAARD & SMITH LLP

KMW/clc  
Enclosure as indicated.